

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	
)	
WATERFRONT PLANTATION LLC, AND MATT C. CALDWELL)	DIVISION OF WATER POLLUTION CONTROL
)	
RESPONDENTS)	CASE NUMBER WPC07-080
)	

ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department" respectively).

II.

Waterfront Plantation, LLC, is an active limited liability company licensed to do business in the state of Tennessee (hereinafter "Respondent Waterfront"). Respondent Waterfront is the owner and developer of Waterfront Plantation Subdivision, a residential development of approximately 380 acres in Roane County, Tennessee (hereinafter "the site"). Service of process may be made on Respondent Waterfront through Matt C. Caldwell, Registered Agent, at 1000 Waterford Place, Kingston, Tennessee 37763.

III.

Matt C. Caldwell (hereinafter “Respondent Caldwell”), is a resident of Tennessee and is the signatory authority responsible for construction activities at the site. Service of process may be made on Respondent Caldwell at 1000 Waterford Place, Kingston, Tennessee 37763.

JURISDICTION

IV.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 *et seq.*, the Water Quality Control Act, (the “Act”) has occurred, or is about to occur, the commissioner may issue a complaint to the violator and the commissioner may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (the “Rule”). Pursuant to T.C.A. § 69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

V.

The Respondents are “persons” as defined by T.C.A. § 69-3-103(20) and as herein described, the Respondents have violated the Act.

VI.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the general permit for Storm Water Discharges Associated with Construction Activity (“TNCGP”) may be obtained by submittal of a Notice of Intent (“NOI”). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (“ARAP”) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

Watts Bar Reservoir and the unnamed tributaries to Watts Bar Reservoir are “waters of the state,” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, these waters of the state are classified for the following uses: domestic water supply, industrial water supply, fish and aquatic life, livestock watering and wildlife, irrigation, and navigation. Additionally, Watts Bar Reservoir is listed as having a fish tissue consumption advisory due the presence of contaminated sediments.

FACTS

VIII.

On January 19, 2006, the Division of Water Pollution Control (hereinafter "Division") personnel investigated a complaint from Tennessee Valley Authority personnel (TVA) stating that construction activities at the site were allowing large amounts of eroded material to flow into Watts Bar Reservoir (the reservoir), causing obvious discoloration and sediment deposition to a cove in the reservoir. Division personnel noted that a large area had been graded and grubbed and left in unstable condition. No Erosion Prevention and Sediment Control measures (EPSC) were observed on the site. Division personnel identified two unnamed tributaries to the reservoir. One unnamed tributary (unnamed tributary number one - UNT #1) had been graded, all the riparian vegetation removed and the channel left in unstable condition. A minor road crossing had been constructed over UNT #1. The lack of EPSC measures at this road crossing was allowing eroded material to migrate into the tributary and into the reservoir. Eroded material from adjacent, unstable construction areas was migrating into both unnamed tributaries and into the reservoir. Additionally, Division personnel noted that a ditch had been cut from within the site. This ditch empties directly into the reservoir and eroded material from the site was migrating down the ditch and into the reservoir. A file review indicated that coverage under the TNCGP and ARAP authorization had not been issued for activities at the site.

IX.

On January 20, 2006, the Division issued a Notice of Violation (NOV) to Respondent Waterfront for the violations observed during the January 19, 2006, complaint investigation. The NOV instructed Respondent Waterfront to immediately install EPSC measures to prevent additional eroded material from entering waters of the state and to prepare a Corrective Action

Plan (CAP) for the restoration of UNT #1, to be submitted along with an application package requesting an ARAP General Permit for Stream Restoration and Habitat Enhancement. The NOV further required that the installation of the EPSC measures be conducted prior to submitting a NOI and Storm Water Pollution Prevention Plan (SWPPP) for coverage under the TNCGP and requested that representatives for Respondent Waterfront be present for a compliance review meeting (CRM) to be conducted February 3, 2006, at the Water Pollution Control Division offices in the Knoxville Environmental Field Office (K-EFO). Also on January 20, 2006, the Division received photographs taken by TVA personnel on January 17, 2006, in which plumes of discolored water were clearly visible running from the site into the reservoir. The lack of EPSC measures within the site was also clearly observable from these photographs. Respondent Waterfront acknowledged receipt of the NOV on January 25, 2006.

X.

On January 25, 2006, Division personnel met Respondent Caldwell and his representatives at the site to discuss compliance issues, possible corrective measures and the status of the two unnamed tributaries. Aquatic organisms were observed in UNT #1. These organisms and the approximate point of origin of UNT #1 were pointed out to the representatives of Respondent Caldwell. Respondent Caldwell requested that the February 3, 2006, CRM be rescheduled to February 7, 2006.

XI.

On February 7, 2006, a CRM was held at the K-EFO. Division personnel outlined the seriousness of the violations at the site. It was pointed out to Respondent Caldwell that he had applied for and received TNCGP coverage for an adjacent site several months prior to the

January 19, 2006, complaint investigation and was therefore aware of the TNCGP requirements. Respondent Caldwell submitted a document outlining compliance measures taken at the site up to that date. This document indicated that seeding activities were taking place at the site as early as October 2005.

XII.

On March 2, 2006, the Division received a NOI, SWPPP and application fee requesting coverage under the TNCGP. The Division also received a CAP and ARAP application requesting authorization under the ARAP for Stream Restoration and Enhancement. TNCGP coverage and authorization under the ARAP were both issued March 28, 2006.

XIII.

On May 19, 2006, the Division conducted a complaint investigation at the site. Division personnel noted attempts at compliance with the violations addressed in the January 20, 2006, NOV and the TNCGP. However, these efforts were noted to be inadequate. Many of the measures had not been correctly installed or maintained. Eroded material had overwhelmed silt fences and sediment traps in several areas leading directly into the reservoir. Additionally, the road crossing over UNT #1 was not stabilized and was allowing eroded material to migrate in the tributary and into the reservoir. Despite the recent seeding efforts, the site remained unstable with sparse vegetative cover.

XIV.

On May 22, 2006, the Division issued a NOV to Respondent Waterfront for the violations noted during the May 19, 2006 complaint investigation. This NOV instructed

Respondent Waterfront to correct the deficiencies outlined therein and update the SWPPP for the site. Respondent Waterfront acknowledged receipt of the NOV on May 25, 2006.

XV.

On June 5, 2006, Division personnel sent copies of the field drawings and areas of concern from the May 19, 2006, compliance inspection to Respondent Waterfront's representatives.

XVI.

On August 15, 2006, Division personnel conducted a compliance inspection of the site and noted continuing violations of the TNCGP. Large areas of the site did not have vegetative cover, were unstable and were eroding. Gullies had formed on the slopes in numerous areas of the site. Eroded material from the unstable embankment along the access road to the site was migrating into UNT #1 and into the reservoir. Eroded material was migrating into the reservoir from adjacent unstable areas. Division personnel met Respondent Caldwell at another location and then both returned to the site where the areas of concern were pointed out to Respondent Caldwell.

XVII.

On September 14, 2006, the Division issued a NOV for the violations noted during the August 15, 2006 compliance inspection. This NOV instructed Respondent Waterfront to correct all violations of the Act as soon as possible. Respondent Waterfront acknowledged receipt of this NOV on September 18, 2006.

XVIII.

On November 14, 2006, Division personnel, along with personnel from the U.S. Environmental Protection Agency, met Respondent Caldwell at the site. Division personnel noted some improvement in compliance with the TNCGP. Respondent Caldwell was instructed to improve compliance efforts at the site.

XIX.

On February 13, 2007, Division personnel conducted a compliance inspection of the site. The EPSC measures had not been maintained and large areas were still bare and unstable. The gullies previously noted had not been addressed and the roadside ditches were unstable. Eroded material was migrating into the unnamed tributaries and into the reservoir.

VIOLATIONS

XX.

By altering waters of the state without authorization under an ARAP and conducting land disturbance activities without coverage under the TNCGP, the Respondents have violated T.C.A.

----- §§ 69-3-108(a)–(b), 114(b), which state in part: -----

§ 69-3-108(a):

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any Waters of the State;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

§ 69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXI.

----- By failing to properly install and maintain EPSC-measures at a land disturbance site, the activity described herein did or was likely to cause an increase in the discharge of wastes into the waters of the state. Therefore, the Respondents have violated T.C.A. Sections 69-3-108(b) and 69-3-114(b) as referenced above.

XXII.

By failing to post the NOC and SWPPP on site as required under the TNCGP, the Respondents have violated T.C.A. Section 69-3-114(b) as referenced above.

XXIII.

By failing to maintain EPSC inspection reports as required under the TNCGP, the Respondents have violated T.C.A. Section 69-3-114(b) as referenced above.

XXIV.

By discharging materials or wastewater without coverage under a storm water NPDES permit, the Respondents have violated T.C.A. Sections 69-3-108(a) and 69-3-114(b) as referenced above.

XXV.

By causing a condition of pollution to the two unnamed tributaries to Watts Bar Reservoir and to Watts Bar Reservoir itself, the Respondents have violated T. C. A. Section 69-3-114(a).

T.C.A. §69-3-114(a) states:

It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

XXVI.

During the course of investigating the Respondent's activities, the Division incurred damages in the amount of SEVEN HUNDRED FIFTY TWO DOLLARS AND TWELVE CENTS (\$752.12).

ORDER AND ASSESSMENT

XXVII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

1. The Respondents shall, within 30 days of receipt of this ORDER, submit an updated SWPPP, showing the methods proposed to establish effective EPSC measures on-site and to implement Best Management Practices as outlined in Tennessee Erosion and Sediment Control Handbook such that sediment is not allowed to leave the site or enter waters of the state. These measures shall consist of, but not be limited to, establishing vegetative cover, grading of severely eroded slopes prior to stabilization attempts, installation of rock check dams, silt fences and sediment basins. These EPSC measures shall be designed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, shall be approved by the Water Pollution Control Manager in the K-EFO and shall be maintained until all land disturbance at the site is complete and erosion-preventive permanent cover is established. The Respondents shall submit this updated SWPPP to the Water Pollution Control Manager in the K-EFO

at 3711 Middlebrook Pike, Suite 220, State Plaza, Knoxville, Tennessee 37921, and shall submit a copy to the Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534.

2. The Respondents shall, within 60 days of approval of the activities outlined in item 1 above, complete those activities and submit photographic and written documentation of the completion of those activities to the Water Pollution Control Manager in the K-EFO and shall submit a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.
3. The Respondents shall, within 30 days of completion of the activities approved in item 1 above, submit a Corrective Action Plan (CAP) to the Division. This plan shall be developed by a professional engineer licensed in the state of Tennessee or a landscape architect licensed in the state of Tennessee, or other professional with experience in the design and implementation of such activities and shall;
 - a. Detail the manual methods to be used for the removal of the accumulated sediment from the two unnamed tributaries identified by K-EFO personnel, and detail the proposed restoration of the those two tributaries,
 - b. Identify any other waters of the state within the site and assess any impacts from construction activities to those waters, detail the manual methods to be used for the removal of accumulated sediment from those waters and detail the proposed restoration of those waters,

The CAP shall be submitted the Water Pollution Control Manager in the K-EFO and a copy to the E&C Section at the respective addresses shown in item 1, above. Any

deficiencies shall be corrected by the Respondents with 30 days of notification of those deficiencies and the revised CAP resubmitted to the Water Pollution Control Manager in the K-EFO and a copy resubmitted to the E&C Section, at the respective addresses shown in item 1, above.

4. The Respondents shall, within 90 days of written approval from the Water Pollution Control Manager in the K-EFO, complete all activities outlined in the CAP and submit photographic and written documentation of completion of those activities to the Water Pollution Control Manager in the K-EFO and a copy of the documentation to the E&C Section, at the respective addresses shown in item 1, above.
5. The Respondents shall commence no other land disturbance activities at the site except those activities that are required in order to achieve compliance with the requirements of the TNCGP. Once compliance has been achieved and the site is stabilized, additional land disturbance activities may resume following written approval by the Water Pollution Control Manager in the K-EFO.
6. The Respondents shall, within one year of receipt of this ORDER, attend a Fundamentals of Erosion Prevention and Sediment Control Workshop provided by the Tennessee Department of Environment and Conservation, and submit documentation of successful completion to the K-EFO and a copy to the E&C Section, at the respective addresses above. The Respondents should obtain certification for all supervisory level personnel who are expected to be responsible for land disturbance activities or erosion prevention

and sediment control at the site. Information may be found on the program website at <http://www.tnepsc.org/>.

7. The Respondents shall pay DAMAGES to the Division in the amount of SEVEN HUNDRED FIFTY TWO DOLLARS AND TWELVE CENTS (\$752.12).
8. The Respondents shall pay a CIVIL PENALTY of THREE HUNDRED NINETY THOUSAND DOLLARS (\$390,000.00) to the Division, hereby ASSESSED to be paid as follows:
 - a. The Respondents shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of ONE HUNDRED THIRTY THOUSAND DOLLARS (\$130,000.00).
 - b. If the Respondents fail to comply with Part XXVI, item 1 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
 - c. If the Respondents fail to comply with Part XXVI, item 2 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
 - d. If the Respondents fail to comply with Part XXVI, item 3 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.

- e. If the Respondents fail to comply with Part XXVI, item 4 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
- f. If the Respondents fail to comply with Part XXVI, item 5 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), payable within 30 days of default.
- g. If the Respondents fail to comply with Part XXVI, item 6 above in a timely manner, the Respondents shall pay a CIVIL PENALTY in the amount of TEN THOUSAND DOLLARS (\$10,000.00), payable within 30 days of default.
- h. In the event of default of items 1 - 6, the Respondent is hereby assessed an additional penalty in the amount FIVE HUNDERED DOLLARS (\$500.00) for each and every day the default continues. Said additional penalties are due and payable to the Department as they accrue.
- i. For good cause demonstrated by the Respondent for missing a deadline set out in the Order, the Commissioner may waive the requirement that a penalty assessed by paragraph (6)(h) be paid

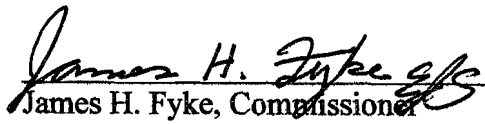
The Respondents shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated

length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 26th day of June, 2007.


James H. Fyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109 and 69-3-115, allow the Respondents to secure review of this ORDER AND ASSESSMENT. To secure review of this ORDER AND ASSESSMENT, the Respondents must file with the director at the address below a written petition setting forth each of the Respondent's contentions and requesting a hearing before the

Water Quality Control Board. The Respondents must file the written petition within thirty (30) days of receiving this ORDER AND ASSESSMENT.

If the required written petition is not filed within thirty (30) days of receipt of this ORDER AND ASSESSMENT, the ORDER AND ASSESSMENT shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the ORDER AND ASSESSMENT will not be subject to review pursuant to T.C.A. §§ 69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act.) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondents may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented by any legal proceeding resulting from an appeal of this ORDER and ASSESSMENT by an attorney licensed to practice law in the state of Tennessee.

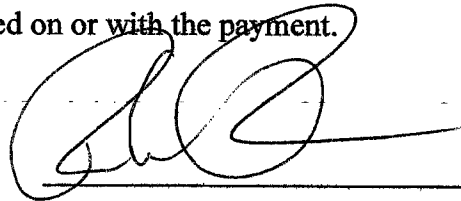
At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the ORDER and ASSESSMENT. This includes the authority to modify the penalty within the statutory confines (up to \$10,000 TEN THOUSAND DOLLARS per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department, including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to Patrick N. Parker, Assistant General Counsel at the address listed below. All other correspondence shall be sent to Water Pollution Control Enforcement and Compliance (E&C) Section Manager, at 401 Church Street, 6th Floor L&C Annex, Nashville, Tennessee 37243-1534. The case number, WPC07-080 should be written on all correspondence regarding this matter.

Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to Patrick N. Parker, Assistant General Counsel, Tennessee Department of Environment and Conservation, 401 Church Street, 20th Floor, L&C Tower, Nashville, TN 37243-1548.

The case number, WPC07-080, should be included on or with the payment.

A handwritten signature in black ink, appearing to be 'P. Parker', written over a horizontal line.

Patrick N. Parker
Tennessee Department of Environment
& Conservation
401 Church Street
L & C Tower, 20th Floor
Nashville, TN 37243-1548